**Summary to the Decision of the Second Senate of the Constitutional Court No. 5-r(ІІ)/2023 dated July 5, 2023 in the case upon the constitutional complaints of Anatolii Dushenkevych, Andrii Franko, and Iryna Yarosh regarding the conformity of paragraph 2 of Article 483.1 of the Customs Code with the Constitution (constitutionality) (regarding individualisation of an individual’s legal liability for customs rules violation)**

Subjects of the right to a constitutional complaint – A. Dushenkevych, A. Franko, I. Yarosh – appealed to the Constitutional Court to examine the compliance of paragraph 2 of Article 483.1 of the Customs Code (hereinafter referred to as “the Code”) with Articles 8.1, 41.1, 41.4, 61.2, 64.1 of the Constitution (constitutionality).

Subjects of the right to constitutional complaints raised before the Constitutional Court the issue of non-compliance with the Constitution (unconstitutionality) of paragraph 2 of Article 483.1 of the Code, which defines the sanction for movement or actions aimed at movement of goods across the customs border of Ukraine with concealment from customs control.

In order to protect customs interests and customs security of Ukraine, the Code establishes administrative liability for violation of customs rules.

According to Article 487 of the Code, proceedings in cases of violation of customs rules shall be carried out in accordance with the Code, and in the part not regulated by the Code, in accordance with the legislation on administrative offenses.

The legislator, within the limits of its authority, established that administrative liability for the illegal movement of goods across the customs border of Ukraine arises in the event that a court imposes an administrative fine on a person who illegally moved goods across the customs border of Ukraine, as a result of which this person suffers adverse consequences, which constitute the content of the imposed on it fine established by the Administrative Code. At the same time, the content of the non-alternative sanction of Article 483.1 of the Code excludes the evaluation of the individual situation by the court, which creates obstacles for judicial discretion.

The Constitutional Court, having analysed the sanction of Article 483.1 of the Code, states that its provisions have a criminal and legal nature both in terms of their punitive and deterrent purpose, and in terms of the gravity of the additional mandatory administrative penalty determined by it in the form of confiscation of goods – direct objects of violation of customs rules, therefore, the imposition of such penalty should be carried out taking into account the principles and guarantees inherent in criminal proceedings.

The contested provisions of Article 483.1 of the Code establish the mandatory confiscation of goods – direct objects of violation of customs rules. The Code on Administrative Offenses and the Code do not define procedural mechanisms that would provide a court with opportunity to mitigate the degree of administrative liability specified in paragraph 2 of Article 483.1 of the Code depending on the presence of circumstances of the case that mitigate liability, or would allow it not to be assigned.

It follows from the content of the sanction of Article 483.1 of the Code that the legislator determined the measure of administrative liability, which is not fair and such that corresponds to a legitimate goal.

The imposition of a fine equal to the value of the goods and confiscation, which are mandatory, deprived the courts of the opportunity to take into account individual circumstances in each specific case of violation of customs rules.

The impossibility of choosing the type and size of the administrative sanction taking into account the circumstances of the case, namely: the nature of the committed illegal act, the form of guilt, the characteristics of the individual, the possibility of compensation for the damage caused, the presence of circumstances that mitigate or aggravate liability, makes it impossible for the court to fairly deliberate the case.

Such legislative regulation contradicts the principles of a democratic society based on the rule of law.

The Constitutional Court takes into account the fact that declaring paragraph 2 of Article 483.1 of the Code as unconstitutional will make it impossible to prosecute individuals for actions and (or) inaction aimed at moving goods across the customs border of Ukraine with concealment from customs control, as well as other illegal actions aimed at evading payment of customs payments, and considers it expedient to postpone the loss of effect of paragraph 2 of Article 483.1 of the Code in order to prevent violation of customs interests and customs security of Ukraine.

Thus, the Constitutional Court of Ukraine held to declare paragraph 2 of Article 483.1 of the Customs Code as inconsistent with the Constitution of Ukraine (unconstitutional), and shall lose its effect six months after the adoption of this Decision by the Constitutional Court.

The Verkhovna Rada shall bring the normative regulation established by paragraph 2 of Article 483.1 of the Customs Code, which is declared to be unconstitutional, into compliance with the Constitution and this Decision.

**References:**

*Decisions of the Constitutional Court:*

No. 15-rp/2004 dated November 2, 2004,

No. 26-rp/2009 dated October 19, 2009,

No. 5-rp/2015 dated May 26, 2015,

No. 2-rp/2016 dated June 1, 2016,

No. 3-r(I)/2019 dated June 5, 2019,

No. 3-r(ІІ)/2021 dated July 21, 2021,

No. 4-r(ІІ)/2022 dated June 15, 2022,

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*Judgments of the European Court of Human Rights:*

case of Engel and others v. the Netherlands of June 8, 1976 (application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72),

case of Lutz v. Germany of August 25, 1987 (application no. 9912/82),

case of Gurepka v. Ukraine of September 6, 2005 (application no. 61406/00),

case of A. Menarini Diagnostics S.R.L. v. Italy of September 27, 2011 (application no. 43509/08),

case of Nadtochiy v. Ukraine of May 15, 2008 (application no. 7460/03),

case of Krayeva v. Ukraine dated January 13, 2022 (application no. 72858/13),

case of Imeri v. Croatia of June 24, 2021 (application no. 77668/14),

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case of Jahn and Others v. Germany [GC] of June 30, 2005 (applications no. 46720/99, 72203/01, 72552/01),

case of Gogitidze and Others v. Georgia of May 12, 2015 (application no. 36862/05),

case of Sadocha v. Ukraine of July 11, 2019 (application no. 77508/11).